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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
ROBERT T. MATSUI FEDERAL COURTHOUSE**

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,

v.

KATHLEEN ALLISON, in her official
capacity as Secretary of the
California Department of
Corrections and Rehabilitation

Defendant

COUNTY OF AMADOR, a public agency
of the State of California

Plaintiff,

v.

KATHLEEN ALLISON in her official
capacity as Secretary of the
California Department of
Corrections and Rehabilitation;
PATRICK COVELLO in his official
capacity of Warden of California
Department of Corrections and
Rehabilitation Mule Creek State
Prison,

Defendants

JASON FLANDERS (Bar No. 238007)

Case No.: 2:20-cv-02482-WBS-AC

**PLAINTIFF CALIFORNIA
SPORTFISHING PROTECTION
ALLIANCE'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

Judge: Hon. William B. Shubb

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TABLE OF CONTENTS

I.	INTRODUCTION	8
II.	FACTUAL BACKGROUND	10
A.	Mule Creek State Prison MS4	10
B.	The Regional Board's Initial Investigation into Reports of Discharges from the Facility	12
C.	Small MS4 Permit Coverage and 13383 Orders	13
D.	Defendants' Stormwater and Receiving Water Sampling	14
1.	Sampling at MCSP2 and MCSP3 (April 2019-Dec. 2020)	14
2.	Sampling at MCSP5 and MCSP6 (Jan. 2021-March 2022)	15
3.	Reports of Ongoing Discharges at MCSP2 and MCSP3	16
E.	Defendants' Non-Stormwater Discharges	16
1.	Defects in the MS4 and Sanitary Sewer System	16
2.	Other Non-Stormwater Discharges	17
F.	Limited Implementation of Best Management Practices	18
III.	STANDARD OF REVIEW	19
IV.	ARGUMENT	20
A.	Whether Violations of the Small MS4 Permit Were Ongoing at the Time the Complaint Was Filed Is a Disputed Fact	20
B.	Background and Non-Human Sources of Contamination Do Not Excuse Defendants' Violations of the Small MS4 Permit	25
C.	The Arguments Defendants Make Related to Provision D – Receiving Water Limitations – Are Irrelevant to the Court's Analysis of Violations	26
1.	Provision D Does Not Require CSPA to Show Mule Creek Is or Should Be Listed under the 303(d)	27
2.	CSPA Need Not Show that Defendants Are the Sole Cause of <i>E. Coli</i> or Metals in Mule Creek	28

1	3. Engaging in the Iterative Process Does Not Excuse	
2	Violations of Provision D.	29
3	D. Defendants Improperly Interpret Provision B.1 by Limiting	
4	the Types of Waste Prohibited by the Basin Plan.....	31
5	E. Whether or Not the Discharges Cause or Threaten to Cause a	
6	Condition of Pollution or Nuisance in Violation of Provision B.2	
7	Is a Disputed Question of Fact for Trial.....	36
8	F. There Are Numerous Disputes of Material Fact as to	
9	Defendants' Violations of Provision B.3.....	38
10	1. The Regional Board Has Found Defendants Have Discharged	
11	Wastewater from the MS4; and CSPA's Evidence Supports that	
12	Conclusion.....	39
13	2. Defendants Admit that Irrigation Water (i.e., Non-	
14	Stormwater) Has Discharged and Continues to Discharge through	
15	the MS4 Due to Defects in the Irrigation System.	41
16	3. Defendants Have Not Effectively Prohibited the Identified	
17	Sources of Non-Stormwater.	41
18	G. Defendants Misstate Plaintiff CSPA's Claim Regarding the	
19	Land Application Areas.....	44
20	V. CONCLUSION	46

TABLE OF AUTHORITIES

Federal Cases

<i>Ambat v. City & County of San Francisco</i> , 757 F.3d 1017 (9th Cir. 2014)	20, 25
<i>Baykeeper v. Kramer Metals, Inc.</i> , 619 F.Supp.2d 914 (C.D. Cal. 2009)	28
<i>Cal. Sportfishing Protection Alliance v. Chico Scrap Metal</i> , 124 F.Supp.3d 1007 (E.D. Cal. 2015)	28
<i>Cal. Sportfishing Protection Alliance v. River City Waste Recyclers</i> , 205 F.Supp.3d 1128 (E.D. Cal 2016)	28
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	20
<i>Chesapeake Bay Found. v. Gwaltney</i> , 844 F.2d 170 (4th Cir. 1988) 21, 25	
<i>Defenders of Wildlife v. Browner</i> , 191 F.3d 1159 (9th Cir. 1999). 43	
<i>Gwaltney of Smithfield v. Chesapeake Bay Found.</i> , 484 U.S. 49 (1987)	21
<i>Hall v. Hall</i> , 138 S. Ct. 1118 (2018)	44
<i>Hawaii Wildlife Fund v. Cnty. of Maui</i> , 550 F.Supp.3d 871 (D. Haw. 2021)	40
<i>Hawaii's Thousand Friends v. City and Cty. of Honolulu</i> , 821 F.Supp. 1368 (D. Haw. 1993)	31
<i>Nat. Res. Def. Council v. Texaco Ref. & Mktg. Inc.</i> , 2 F.3d 493 (3d Cir. 1993)	21
<i>NRDC v. Cnty of Los Angeles</i> , 673 F.3d 880 (9th Cir. 2011)	30
<i>NRDC v. Cty. of L.A.</i> , 725 F.3d 1194, 1204 (9th Cir. 2013)	28
<i>Nw. Env'tl. Advocates v. City of Portland</i> , 56 F.3d 979 (9th Cir. 1995)	29
<i>Piney Run Pres. Ass'n v. Cty. Comm'rs.</i> , 268 F.3d 255, 270 (4th Cir. 2001)	28
<i>S. Cal. Gas Co. v. City of Santa Ana</i> , 336 F.3d 885 (9th Cir. 2003)	20, 25

Sierra Club v. Union Oil, 853 F.2d 667 (9th Cir. 1988) 21

TW Electrical Service, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, (9th Cir. 1987) 20

Federal Statutes

33 U.S.C. § 1251(a) 34

33 U.S.C. § 1312(a) 34

33 U.S.C. § 1313 (2) (A) 37

33 U.S.C. § 1313(d) passim

33 U.S.C. § 1342(p) (3) (B) (ii) 42, 43

33 U.S.C. § 1365 20

Federal Rules

Fed. R. Civ. P. 56(a) 19

State Cases

Bldg. Indus. Assn. of San Diego Cty. v. State Water Res. Control Bd., 124 Cal.App.4th 866, 885 (2004) 43

Santa Clara Valley Water Dist. v. Cal. Regional Water Quality Control Bd., 59 Cal. App. 5th 199 (2020) 32, 33

Sweeney v. Cal. Reg'l Water Quality Control Bd., 61 Cal. App. 5th 1093 (2021) 34, 38

State Statutes

Cal. Water Code § 13000 34

Cal. Water Code § 13050 36

Cal. Water Code § 13050(c) 32

Cal. Water Code § 13050(1) (1) 36

Cal. Water Code § 13050(m) 36

Cal. Water Code § 13050(m) (1) 37

Cal. Water Code § 13304(e) 35

1	Cal. Water Code §§ 13050 (1) – (m)	36
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I. INTRODUCTION

Since April 2019, Defendants have sampled the discharges from the municipal separate storm sewer system ("MS4") at Mule Creek State Prison ("Facility") to Mule Creek. Those sampling results consistently show that their MS4 discharges far exceed water quality standards ("WQS") for *E. coli*, a fecal indicator bacteria, and various toxic metals. The MS4 is regulated by, and must strictly comply with, the Small MS4 Permit, which requires compliance with WQS. Defendants move for summary judgment yet have provided absolutely no evidence that their discharges meet WQS or otherwise comply with the Small MS4 Permit. Instead, Defendants make a variety of unavailing arguments, which, at a minimum, show multiple disputes of fact or misstate the requirements of the Small MS4 Permit in an attempt to excuse their past and ongoing violations.

First, Defendants argue that Plaintiff California Sportfishing Protection Alliance ("CSPA") cannot show its violations are ongoing at the time the Complaint was filed. Yet post-Complaint sampling shows, at a minimum, a dispute of fact as to whether discharges exceeding WQS have reached Mule Creek. Moreover, Defendants have presented no evidence of actions taken before CSPA filed the Complaint to support a finding that violations are not likely to recur. As such, Defendants have failed to meet their high evidentiary burden as movants for summary judgment.

Second, Defendants' insistence that CSPA must account for 'background' and non-human sources of pollutants in the MS4 discharges at issue is a red herring because the source of the pollutants in their discharges is irrelevant to whether the

1 discharges violate the Small MS4 Permit. The WQS are not limited to
2 *E. coli* derived from only human sources. Moreover, Defendants are
3 responsible for controlling the levels of pollutants discharging
4 from their MS4, regardless of the initial source.

5 Third, the Small MS4 Permit, Provision B.3, prohibits
6 Defendants' discharges from causing or contributing to exceedances
7 of WQS in Mule Creek. Provision B.3 applies regardless of whether
8 Mule Creek is listed as impaired, and CSPA does not need to show
9 that the Facility's discharges are the sole cause of an exceedance.
10 Moreover, the Water Board, as well as Ninth Circuit precedent, has
11 established that Defendants' engagement in an "iterative process"
12 does not provide a "safe harbor" to violations of Provision B.3 (or
13 any other permit provision).

14 Fourth, Defendants' discharge sampling demonstrates violations
15 of Provision B.1 and B.2. With no evidence to support actual
16 compliance with Provision B.1, Defendants attempt to define the
17 problem away, arguing that their MS4 discharges are not "waste" when
18 they plainly fall within the ambit of the Water Code definition. In
19 relation to Provision B.2, Defendants confuse pollution and/or
20 nuisance caused by the discharges, on the one hand, with the
21 receiving water body's listing status on the 303(d) list of impaired
22 water bodies. This argument ignores all the sampling results showing
23 that Defendants' discharges to Mule Creek have exceeded WQS for
24 metals and *E. coli*, and, therefore (as a matter of law or at least
25 a disputed fact) threaten to "unreasonably affect" Mule Creek's
26 beneficial uses or cause a nuisance.

27 Finally, Defendants' argument for summary judgment on CSPA's
28

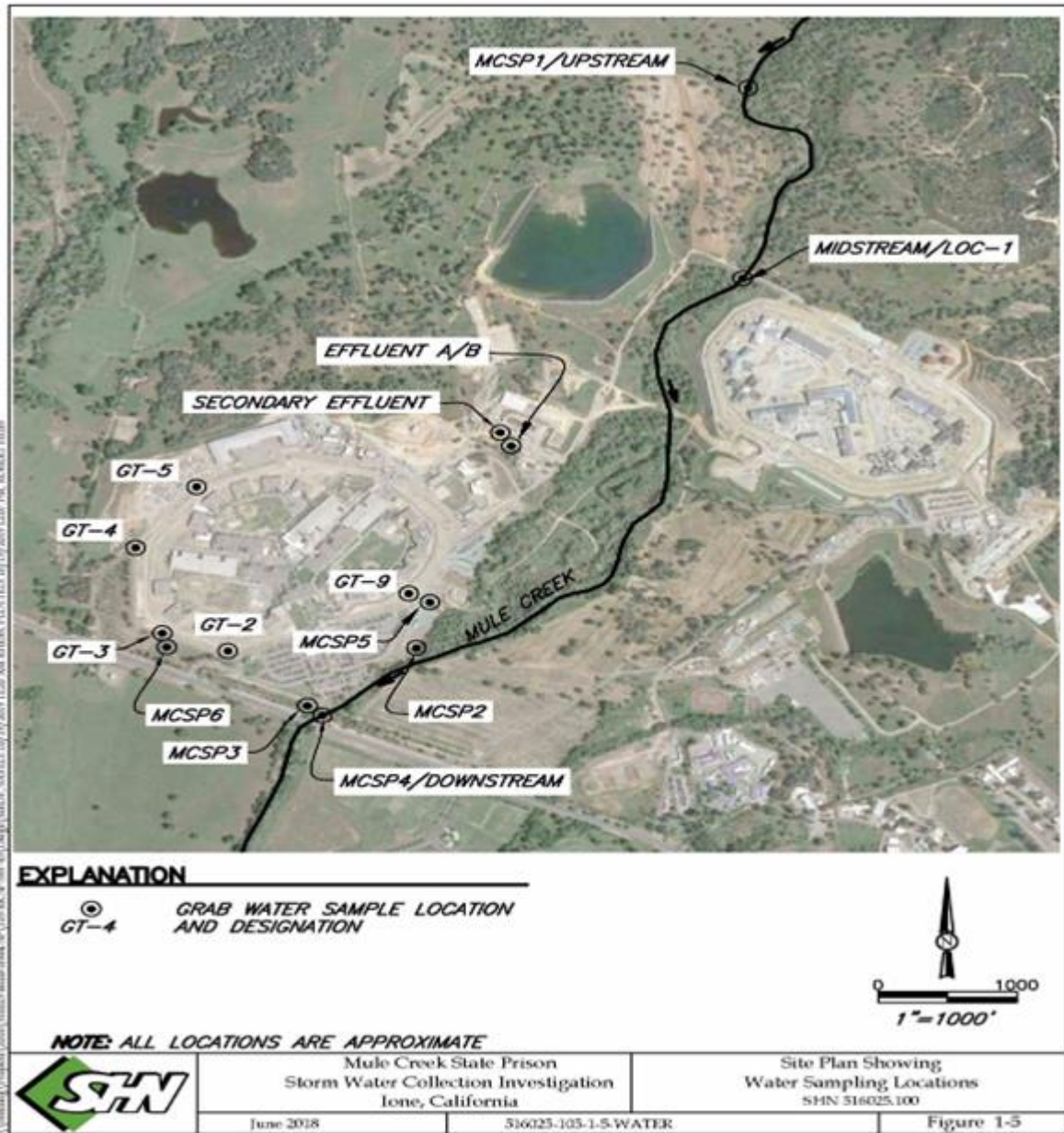
Provision B.3 claim (prohibiting discharges of “material other than storm water” from the MS4) is supported by just two contested studies and ignores all other evidence before the Court: years of Defendants’ self-monitoring reports; the Central Valley Regional Water Quality Control Board’s (“Regional Board’s”) investigation and findings that wastewater is commingled with stormwater in the MS4’s discharges; the presence of pharmaceuticals and personal care products in the MS4 under dry conditions; Defendants’ admission of irrigation system defects; and Defendants’ deposition testimony establishing that Defendants have done nothing to address either source of non-stormwater.

In sum, Defendants have not come close to carrying their burden to show that summary judgment is warranted on any one of CSPA’s claims, let alone all.

II. FACTUAL BACKGROUND

A. Mule Creek State Prison MS4

The Facility’s MS4 collects stormwater runoff and discharges directly to Mule Creek. See ECF No. 95-3 (2020 SHN Report) at 62-32. Stormwater at the Facility runs off of two drainage areas: the Main Drainage Basin and the Secondary Drainage Basin. *Id.* Runoff from both drainage basins is transported through the MS4, enters one of two vegetated areas (which Defendants refer to as “bioswales”), and then discharges to Mule Creek at outfalls identified as MCSP2 and MCSP3. *Id.*; ECF No. 95-2 (Dfts. Separate Statement of Undisputed Facts), ¶¶ 21, 24; ECF No. 95-4 at ¶ 4; Maharg Decl., Ex. 2 (Orta Tr.) at 88:7-89:17 (identifying MCSP2 and MCSP3 as outfalls). The aerial figure pasted below shows the Facility, the MS4, and Mule



Creek.

The MS4 has slide gates located just before (i.e., upstream in the MS4) of the bioswales. ECF No. 95-2, ¶ 18. During dry weather, the slide gates are closed, and pumps direct some of the water in the MS4 to the wastewater treatment plant (WWTP). *Id.* The gates are not water-tight and do not prevent water in the MS4 from flowing through them. Maharg Decl., Ex. 2 (Orta Tr.) at 121:16-22.

Two sampling points—MCSP5 and MCSP6—are located just after the

1 slide gates. ECF No. 95-2, ¶ 17; Maharg Decl., Ex. 2 (Orta Tr.) at
2 96:20-97:10. Defendants open the slide gates during rain events above
3 0.10" per hour or 0.30" over 24 hours. *Id.* at 54:6-55:3; see Maharg
4 Decl., Ex. 3 at MCSP32969. Defendants must notify the Regional Board
5 whenever they open the slide gates and discharge to Mule Creek.
6 Maharg Decl., Ex. 2 (Orta Tr.) at 120:18-20; *id.*, Ex. 7 at MCSP32218.

7
8 **B. The Regional Board's Initial Investigation into Reports of
Discharges from the Facility**

9 On December 28, 2017, the Regional Board received a citizen
10 complaint notifying them of polluted discharges from the Facility.
11 Maharg Decl., Ex. 5 at CALSPORT7466. The complainant reported that
12 discharges to Mule Creek had occurred since August 2017 (in the dry
13 season) and appeared "clear and jet black, sometimes with solids,
14 and sometimes steaming hot." *Id.* Regional Board staff inspected the
15 Facility on January 4, 2018 and determined that the discharges to
16 Mule Creek were coming from the Facility's MS4. *Id.*

17 The Regional Board's samples from the MS4 indicated high levels
18 of bacteria (i.e., total coliforms, *E. coli*, and fecal coliforms),
19 metals, oil and grease, phosphorus, and orthophosphate (a
20 constituent commonly found in sewage). *Id.* At CALSPORT7466-67. Based
21 on the sampling results, Regional Board staff determined that "the
22 water being discharged [from the MS4] into Mule Creek is, at least
23 partially, wastewater commingled with contaminated storm water
24 and/or gray water." *Id.* at CALSPORT7466. At that time, Defendants
25 were not permitted to discharge from the Facility's MS4. On February
26 14, 2018, the Regional Board issued an order pursuant to California
27 Water Code section 13267 ("13267 Order") requiring Defendants to

1 investigate the quality of the discharges, the sources of the
2 discharges, and the condition of the MS4 and sanitary sewer system
3 on site. *See, generally, id.*

4 **C. Small MS4 Permit Coverage and 13383 Orders**

5 Subsequently, the State Water Resources Control Board ("State
6 Board") designated MCSP as a non-traditional MS4, requiring
7 Defendants to seek coverage under the Small MS4 Permit. ECF No. 95-
8 2, ¶¶ 4-5; ECF No. 95-8 at 457-58. Defendants have been permitted
9 under the Small MS4 Permit since April 24, 2019. *Id.*

10 Since then, the Regional Board has issued a series of orders
11 under California Water Code section 13383 ("13383 Orders") requiring
12 Defendants to report sampling of their MS4 discharges and Mule Creek,
13 irrigation flows, the volume of water in the MS4 sent to the WWTP,
14 and rainfall. *See, generally, Maharg Decl., Ex. 6 (Aug. 2020 13383*
15 *Order); Ex. 7 (Dec. 2020 13383 Order).* The stated need for the 13383
16 Orders is:

17 Due to potential water quality impacts to Mule Creek
18 while the Facility's storm water control program is
19 being fully developed and implemented and to ensure
20 compliance with Small MS4 General Permit
21 requirements, the Central Valley Water Board has
22 determined that an interim monitoring and reporting
23 program is necessary to monitor storm water
24 discharges from the Facility to Mule Creek.

25 Maharg Decl., Ex. 6 at MCSP29084 (emphasis added). The 13383 Order
26 issued in August 2020 required sampling of discharges at MCSP2 and
27 MCSP3, which are "stormwater outfall[s] to Mule Creek." *Id.* at
28 MCSP29087-88; ECF No. 95-2, ¶ 24. The 13383 Order also required these
outfall samples to be analyzed for, *inter alia*, metals and *E. coli*.
Id. Defendants were also required to notify the Regional Board within

1 24 hours of discharging to Mule Creek. *Id.* at MCSP29085.

2 The Regional Board revised the 13383 Order on December 22, 2020.
3 See Maharg Decl., Ex. 7 (Dec. 2020 13383 Order). The sampling
4 requirements remained largely the same. See *id.* at MCSP32218-21.
5 However, the Order modified the “outfall monitoring” points to MCSP5
6 and MCSP6. *Id.* at MCSP32220.

7 In November 2021, the Regional Board again revised the 13383
8 Order. ECF No. 95-5, Ex. A, at 15. The Order notes that Defendants
9 are installing permanent monitoring structures at MCSP2 and MCSP3.
10 *Id.* at 16-17. The order requires Defendants to sample discharges at
11 MCSP2 and MCSP3 as soon as the monitoring structures are installed,
12 which was anticipated to be November 2021. *Id.* at 17, 20.

13 In addition to the outfall sampling, the 13383 Orders require
14 sampling in Mule Creek downstream of the MS4 outfalls, at MCSP4. *Id.*
15 at 29; ECF No. 95-2, ¶ 27.

16 **D. Defendants’ Stormwater and Receiving Water Sampling**

17 1. Sampling at MCSP2 and MCSP3 (April 2019-Dec. 2020)

18 Defendants sampled their stormwater discharges to Mule Creek at
19 MCSP2 and MCSP3 from April 8, 2019 to December 17, 2020. See Maharg
20 Decl., Ex. 1 (Ashby Decl.)¹, ¶¶ 10-11, 14; tbls. 2-3, 5. These samples
21 demonstrate that Defendants’ discharges to Mule Creek exceeded *E.*
22 *coli* and metals WQS on 41 and 25 occasions, respectively, during
23 that time period. *Id.* This sampling also showed that on 19 occasions
24 during that time period, Mule Creek, downstream of the Facility at
25 MPCS4, exceeded *E. coli* WQS on the same day the Facility’s discharges

26 _____
27 ¹ For ease of the Court, CSPA attached the Declaration of Karen Ashby
28 in Support of Plaintiffs’ Motion for Summary Judgment, ECF No 45-4,
as Exhibit 1 to the Maharg Declaration.

1 to Mule Creek contained *E. coli* above those standards. *See id.*, ¶
2 12; tbl. 4. Mule Creek exceeded metals WQS on 14 days when the MS4
3 discharges also exceeded metals WQS. *See id.*, ¶ 15; tbl. 6.

4 2. Sampling at MCSP5 and MCSP6 (Jan. 2021-March 2022)

5 While Defendants were installing a permanent monitoring
6 structure at MCSP2 and MCSP3, Defendants regularly reported that the
7 MS4 had discharged to Mule Creek. *See* Maharg Decl., Exs. 8-18
8 (Discharge Notifications). On each of these occasions, Defendants
9 sampled their discharges at MCSP5 and MCSP6. *See id.*

10 Sampling of these discharge events at MCSP5 and MCSP6 between
11 January 2021 and March 2022 showed that Defendants' discharges to
12 Mule Creek exceeded *E. coli* and metals WQS on 9 and 77 occasions,
13 respectively. Maharg Decl., Ex. 1 (Ashby Decl.), ¶¶ 17, 20; tbls. 8,
14 10. This sampling also showed that on 5 occasions during that time
15 period, Mule Creek, downstream of the Facility at MPCS4, exceeded *E.*
16 *coli* WQS on the same day the Facility's discharges contained *E. coli*
17 above those standards. *See id.*, ¶ 19; tbl. 9. Mule Creek, again,
18 downstream of the Facility at MPCS4, exceeded metals WQS on 29 days
19 when the MS4 discharges also exceeded metals WQS. *See id.*, ¶ 21;
20 tbl. 11.

21 In November 2022, the Regional Board noted that Defendants'
22 sampling showed exceedances of aluminum and zinc, and found that
23 Defendants are causing and contributing to exceedances of applicable
24 WQS for metals in Mule Creek. Maharg Decl., Ex. 21 (11/3/2022 Letter)
25 at 2-3. The Regional Board ordered Defendants to create a plan to
26 address these discharges. *Id.*

1 3. Reports of Ongoing Discharges at MCSP2 and MCSP3

2 According to Defendants' reporting to the Regional Board,
3 Defendants successfully calibrated the monitoring structures at
4 MCSP2 and MCSP3 in September 2022. Maharg Decl., Ex. 19 (Sept. 20,
5 2022 Discharge Report). Defendants reported a discharge to Mule Creek
6 on November 2, 2022. *Id.*, Ex. 20. Defendants should have taken
7 samples of those discharges at MCSP2 and MCSP3, which will be
8 reported in the next quarterly report. See ECF No. 95-5 at 17, 20.

9 **E. Defendants' Non-Stormwater Discharges**

10 1. Defects in the MS4 and Sanitary Sewer System

11 Pursuant to Regional Board order, Defendants submitted a Storm
12 Water System Investigation Findings Report, in August 2018, which
13 they revised in October 2019 and again June 2020. See ECF No. 95-3
14 at 42-168 ("SHN Report"). In the SHN Report, Defendants' consultant
15 identified hundreds of defects in the Facility's MS4 and sanitary
16 sewer system. See Maharg Decl., Ex. 22 (Regional Board Review of SHN
17 Report) at MCSP31308. In most places, the report notes, the sanitary
18 sewer system is located *above* the MS4, which allows sewage to leak
19 out of the sanitary sewer system and drain into the MS4 through
20 defects, creating indirect cross connections between the two
21 systems. See *id.* at MCSP31306-07.

22 After reviewing these findings in the SHN Report as well as
23 the Facility's sampling data, both the Regional Board and the U.S.
24 Environmental Protection Agency ("EPA") determined that wastewater
25 was entering and discharging from the MS4. The Regional Board found:

26 [I]t is clear to Board staff that indirect cross
27 connections have formed between the two systems [the
28 sanitary sewer system and MS4]. There are numerous

locations documented in the CCTV [closed-circuit television] investigation where major defects in both systems could, and have, allowed infiltration and exfiltration. In several areas active infiltration was noted, even during the dry season with no recent rain. . . . The condition of the sanitary sewer and the stormwater system, along with observed practices at the facility, also support the conclusion that some volume of wastewater is entering the [MS4] system.

Maharg Decl., Ex. 22 at MCSP31320-21. EPA similarly found that there was "potential commingling of waters between the stormwater and wastewater systems." Maharg Decl., Ex. 4 at MCSP32976. EPA noted:

the potential for commingling of stormwater and sanitary sewer waters may exist, as both systems are aging and built very close to each other. . . . Additionally, the Regional Board summarized . . . approximately 600 water samples MCSP collected from the stormwater system, and documented elevated levels of multiple pollutants which indicate contamination of the storm sewer system and discharges that exceed water quality standards. Without addressing these issues, the potential commingling and subsequent discharge of sewage through the stormwater system to Mule Creek exists.

Id. at MCSP32976. Defendants confirmed they had not fixed the defects in their sanitary sewer system as of August 2022. Maharg Decl., Ex. 2 (Orta Tr.) at 114:6-13.

2. Other Non-Stormwater Discharges

Defendants have reported that they regularly discharge large volumes of irrigation water through the MS4 into Mule Creek. Maharg Decl., Ex. 7 at MCSP32215. In response, the Regional Board ordered Defendants to prepare a report:

...to demonstrate that the non-storm water discharges through the MS4 are in compliance with the Discharge Prohibitions in the Small MS4 General Permit or [] [i]f the non-storm water discharge does not comply with the Discharge Prohibitions, provide a proposed

1 plan . . . to eliminate the non-storm water
2 discharge.

3 *Id.* at MCSP32217-18.

4 Because Defendants reported that irrigation discharges to the
5 MS4 resulted from defects in the irrigation system, the Regional
6 Board found that the irrigation discharges were not permissible non-
7 stormwater discharges under the exceptions in Provision B.3 of the
8 Small MS4 Permit. Maharg Decl., Ex. 24 at MCSP40146 ("the irrigation
9 runoff does not meet the [Small MS4 Permit's] definition of
10 incidental runoff"); see also Maharg Decl., Ex. 23 at MCSP33473.
11 Defendants then submitted a plan, stating that they would not come
12 into compliance with Provision B.3 with regard to their irrigation
13 discharges, until February 2025. ECF No. 95-4 (Orta Decl.) at ¶ 19.

14 **F. Limited Implementation of Best Management Practices**

15 Defendants have implemented limited Best Management Practices
16 ("BMPs") at the Facility. Defendants' representative designated to
17 speak to the BMPs and the pollutants intended to be addressed by
18 each BMP, Anthony Orta, testified he was only aware of BMPs intended
19 to reduce sediment, not any such measures to reduce metals or *E.*
20 *coli*. See Maharg Decl., Ex. 2 (Orta Tr.) at 18:24-19:15 (wattles and
21 gravel bags to address sediment), 98:8-25.

22 In addition, the vast majority of the BMPs at the Facility were
23 in place before long before this action was initiated. Mr. Orta
24 testified that Defendants have not made any changes to the storm
25 sewer system or the MS4 since September 17, 2019. See Maharg Decl.,
26 Ex. 2 (Orta Tr.) at 107:18-24; see also *id.*, Ex. 25 (SHN Report,
27 Appendix 10) at MCSP4560); see also ECF No. 95-3 (SHN Report) at 72.
28 Mr. Orta further testified that Defendants have not made any further

1 operational changes at the Facility, since October 2019, to reduce
2 non-stormwater flows to the MS4, except for applying for funding to
3 replace the irrigation system. See Maharg Decl., Ex. 2 (Orta Tr.) at
4 107:25-108:9, 110:6-16; see ECF No. 95-4 at 19 (BMPs to reduce non-
5 stormwater discharges in place since June 29, 2018).

6 The bioswales between MCSP5 and MCSP2 and between MCSP6 and
7 MCSP3, which Defendants identify as a stormwater BMP, were in place
8 before the Facility was covered by the Small MS4 Permit, and
9 Defendants have not made any changes to the bioswales since that
10 time. Maharg Decl., Ex. 2 (Orta Tr.) at 97:19-24, 112:17-22.
11 Moreover, Mr. Orta did not know whether or how the bioswales were
12 designed, whether Defendants had ever evaluated their effectiveness,
13 or even whether the purpose of the bioswales is to reduce pollutants.
14 *Id.* at 97:25-98:7, 113:2-10.

15 The only BMP that Defendants have implemented after this action
16 was initiated is the installation of monitoring structures at MCSP2
17 and MCSP3. Yet, the intent of this project is to "allow for accurate
18 characterization of volume of water released to Mule Creek," not to
19 reduce pollutants in these discharges. See ECF No. 95-4 at 18
20 (project "to accurately monitor discharge volumes to Mule Creek");
21 Maharg Decl., Ex. 3 (Larabee Tr.) at 77:11-15.

22 **III. STANDARD OF REVIEW**

23 Summary judgment is proper only "if the movant shows that there
24 is no genuine dispute as to any material fact and the movant is
25 entitled to judgment as a matter of law" with respect to a claim or
26 defense. Fed. R. Civ. P. 56(a). The party moving for summary judgment
27 bears the initial burden of establishing the absence of a genuine
28

1 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-
2 23 (1986). Because summary judgment is a “drastic device” that cuts
3 off a party’s right to present its case to a jury, the moving party
4 bears a “heavy burden” demonstrating the absence of any triable issue
5 of material fact. *Ambat v. City & County of San Francisco*, 757 F.3d
6 1017, 1031 (9th Cir. 2014); *S. Cal. Gas Co. v. City of Santa Ana*,
7 336 F.3d 885, 888 (9th Cir. 2003) (moving party must establish
8 “beyond controversy every essential element” of each claim).

9 If the movant meets its high burden, the non-moving party then
10 must designate specific facts showing there is a genuine issue for
11 trial. *Celotex Corp.*, 477 U.S. at 324; *S. California Gas Co.*, 336
12 F.3d at 888 (non-moving party “can defeat summary judgment by
13 demonstrating the evidence, taken as a whole, could lead a rational
14 trier of fact to find in its favor”). Both direct and circumstantial
15 evidence may be used to show that a genuine issue of material fact
16 exists. At the summary judgment stage, the court must view the
17 evidence in the light most favorable to the non-moving party. *S.*
18 *Cal. Gas Co.*, 336 F.3d at 888. If evidence produced by the moving
19 party conflicts with evidence proffered by the non-moving party, the
20 court must assume the truth of the evidence submitted by the non-moving
21 party. *TW Electrical Service, Inc. v. Pacific Electrical Contractors*
22 *Assoc.*, 809 F.2d 626, 630-631 (9th Cir. 1987).

23 **IV. ARGUMENT**

24 **A. Whether Violations of the Small MS4 Permit Were Ongoing at** 25 **the Time the Complaint Was Filed Is a Disputed Fact.**

26 Clean Water Act § 505, 33 U.S.C. § 1365, confers jurisdiction
27 over citizen suits when the citizen-plaintiffs make a good-faith
28

1 allegation of continuous or intermittent violation . . .” *Gwaltney*
2 *of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987). A
3 plaintiff does not need to show ongoing violations throughout the
4 litigation. *See Gwaltney*, 484 U.S. at 66-67. A plaintiff’s burden is
5 met when they allege an ongoing violation when the complaint is
6 filed. *See Nat. Res. Def. Council v. Texaco Ref. & Mktg. Inc.*, 2
7 F.3d 493, 503 (3d Cir. 1993) (“once a citizen plaintiff establishes
8 an ongoing violation of a parameter at the time the complaint is
9 filed, the court is obliged to assess penalties for all proven
10 violations of that parameter”). Thus, only facts evidencing whether
11 “defendant’s continued violation had been completely eradicated when
12 citizen-plaintiffs filed suit” are relevant to this inquiry.
13 *Chesapeake Bay Found. v. Gwaltney*, 844 F.2d 170, 172 (4th Cir. 1988),
14 *on remand from* 484 U.S. 49 (1987).

15 Defendants assert that CSPA cannot meet its obligation to show
16 that violations were ongoing when it filed its Complaint on December
17 15, 2020 (ECF No. 1). *See* ECF No. 95-1 at 22-23. Defendants’ argument
18 relies on a fundamental mischaracterization of the law. CSPA does
19 not need to prove violations occurred after the Complaint was filed
20 for Defendants to be held liable for their pre-Complaint violations.
21 Moreover, a plaintiff can show ongoing violations through additional
22 sampling or “by adducing evidence from which a reasonable trier of
23 fact could find a continuing likelihood of a recurrence in
24 intermittent or sporadic violations.” *Sierra Club v. Union Oil*, 853
25 F.2d 667, 671 (9th Cir. 1988) (citing *Chesapeake Bay Foundation*, 844
26 F.2d at 171-72). Thus, Defendants are wholly incorrect when they
27 assert that only post-filing samples are “relevant to whether there
28

1 have been 'exceedances' that constitute alleged violations of the
2 Small MS4 Permit." ECF No. 95-1 at 23:18-20. The pre-Complaint
3 samples show Defendants violated the Small MS4 Permit. See Maharg
4 Decl., Ex. 1 (Ashby Decl.), tbls. 2-6. The Court must find Defendants
5 liable for those violations, unless Defendants show there is no
6 dispute that they were in full compliance when CSPA filed the
7 Complaint and have not violated the Small MS4 Permit since.

8 Defendants cannot meet this burden. Defendants presented no
9 evidence they were in compliance with the Discharge Prohibitions and
10 Receiving Water Limitations of the Small MS4 Permit when CSPA filed
11 its Complaint. Rather, the only fact that Defendants rely on in
12 support of this argument is that post-Complaint discharge samples
13 were taken at MCSP5 and MCSP6, rather than MCSP2 and MCS3. *Id.* But
14 Defendants miss a crucial fact: there is post-Complaint sampling at
15 MCSP2 and MCSP3—undisputed points of discharge into Mule Creek—that
16 show MS4 discharges exceeding aluminum, iron, lead, and zinc WQS,
17 establishing violations post-Complaint. Maharg Decl., Ex. 1 at 36-
18 37, tbls. 5-6 (Dec. 17, 2020 sampling). This fact alone is sufficient
19 to defeat Defendants' motion.

20 Moreover, Defendants' argument is based solely on their
21 assertion that it is indisputable that discharges at MCSP5 and MCSP6
22 do not reach Mule Creek. Yet, the Court has already ruled that there
23 is a dispute of material fact as to that very point. ECF 60 at 19:22-
24 20:2 (finding a dispute with regard to whether the concentrations of
25 contaminants detected at MCSP5 and MCSP6 in fact reached Mule Creek).
26 Defendants contort the Court's ruling to argue that Plaintiffs cannot
27 prove this issue. ECF No. 95-1 at 6:24-26.

1 Defendants offer no further evidence to support a finding that
2 Defendants did not discharge to Mule Creek after the Complaint was
3 filed or that it is not likely they will do so in the future. In
4 fact, Defendants admit that “[i]f there is sufficient flow,
5 stormwater is [] discharged from the outfalls at MCSP2 and MCSP3
6 into Mule Creek.” ECF No. 95-2, ¶ 24. Further, Defendants’ post-
7 Complaint reporting demonstrates that waters sampled at MCSP5 and
8 MCSP6 have reached Mule Creek. Pursuant to the 13383 Orders,
9 Defendants must provide discharge notifications to the Regional
10 Board “within 24 hours of the Facility discharging through the MS4
11 to the receiving water” (i.e., Mule Creek). See ECF No. 95-5 at 18;
12 Maharg Decl., Ex. 7 at MCSP32218. Under this requirement, Defendants
13 have reported numerous discharges to Mule Creek from January 2021
14 to, as recent as, November 2, 2022. Maharg Decl., Exs. 8-20. The
15 reported sampling results of show that these discharges far exceeded
16 metals and *E. coli* WQS. See Maharg Decl., Ex. 1 at tbls. 7-11; see
17 Maharg Decl., Ex. 27 (2022 Q2 Monitoring Rpt.) at 3-1.

18 Moreover, Defendants finished installing monitoring structures
19 at MCSP2 and MCSP3 in September 2022 and should now be monitoring
20 discharges at the actual outfalls to Mule Creek. See Maharg Decl.,
21 Ex. 19 (9/20/2022 Discharge Notification); see ECF No. 95-5 at 20.
22 Thus, the November 2, 2022 discharge, which Defendants reported
23 (Maharg Decl., Ex. 20), was presumably monitored at MCSP2 and/or
24 MCSP3, confirming it did reach Mule Creek.

25 Finally, Defendants have not shown that it is undisputed that
26 there is no “continuing likelihood of a recurrence” in the
27 violations. *Sierra Club*, 853 F.2d at 671. CSPA has provided evidence
28

1 of discharges from MCSP2 and MCSP3, which demonstrate years of
2 violations of the Small MS4 Permit through December 2020. Maharg
3 Decl., Ex. 1 at ¶¶ 10-13, 14-15; tbls. 2-6. Defendants moved their
4 sampling locations to MCSP5 and MCSP6 in December 2020 yet have not
5 made any improvements between the last sampling date at MCSP2 and
6 MCSP3 and when CSPA filed its Complaint to reduce pollutants and
7 ensure that their discharges complied with the Small MS4 Permit.
8 Defendants cannot credibly argue that simply moving sampling
9 locations reduced pollutants in their MS4 discharges.

10 Despite Defendants' contrary assertions (ECF No. 95-1 at 7:2-
11 4), Defendants have presented no evidence that the bioswales filter
12 or remove pollutants, let alone in such a way as to ensure discharges
13 meet WQS. The bioswales have been in place since before Defendants
14 were covered by the Small MS4 Permit, and Defendants made no changes
15 to them when they moved sampling locations. Maharg Decl., Ex. 2 (Orta
16 Tr.) at 97:19-24. Thus, the pre-Complaint sampling at MCSP2 and MCSP3
17 had the benefit of whatever pollution reduction the bioswales
18 offered, but those samples far exceeded metals and *E.coli* WQS. Maharg
19 Decl., Ex. 1 (Ashby Decl.) at ¶¶ 10-13, 14-15; tbls. 2-6.

20 Further, Mr. Orta—Defendants' designated representative—did not
21 know if the bioswales were even intended to reduce pollutants. Maharg
22 Decl., Ex. 2 (Orta Tr.) at 97:25-98:7; 113:2-10. And Defendants'
23 sampling shows that the bioswales may increase pollutant
24 concentrations. Samples taken at MCSP3, after the bioswale, showed
25 much higher average levels of *E. coli* than at MCSP6, before the
26 bioswale. See ECF No. 95-5 at 116-117 (compare Table 3.5-9, MSCP6
27 Results, showing average *E. coli* result at 127 MPN/100ml, and Table
28

1 3.5-10, MCSP3 Results, showing average E. coli result at 23,458
2 MPN/100mL; see *id.* (showing higher average results for aluminum and
3 iron at MCSP3 than at MCSP6). Thus, whether the bioswales reduce
4 pollutants is a genuine dispute of fact.

5 In short, Defendants failed to present any evidence of actions
6 taken before CSPA filed its Complaint that would be sufficient for
7 the Court to determine indisputably that "there is no real
8 likelihood" that Defendants would not violate the Discharge
9 Prohibitions or Receiving Water Limitations post-Complaint. *Gwaltney*
10 *II*, 844 F.2d at 172.

11 Finally, Defendants appear to argue that because the Court
12 denied Plaintiffs' Motion for Summary Judgment, CSPA's evidence
13 cannot prove their claims. Defendants overlook the high evidentiary
14 burden that CSPA bore on summary judgment, as compared to the
15 evidence that Plaintiffs can rely on at trial. See *Ambat*, 757 F.3d
16 at 1031; *S. Cal. Gas Co.*, 336 F.3d at 888. Defendants now bear the
17 heavy burden to demonstrate, using undisputed facts, that they came
18 into full compliance with the Small MS4 Permit before CSPA filed its
19 Complaint. Defendants have not come anywhere close to meeting this
20 burden, and their Motion must be denied.

21 **B. Background and Non-Human Sources of Contamination Do Not**
22 **Excuse Defendants' Violations of the Small MS4 Permit.**

23 Defendants argue that CSPA has "completely failed to account
24 for 'background' and non-human sources of alleged pollutants" and
25 contend that this is a "required element of causation" necessary for
26 CSPA to prevail at trial. ECF 95-1 at 21:17-19. In other words,
27 Defendants argue they are not responsible for pollutants in their
28 MS4 discharges if they are derived from natural sources. Defendants

1 do not, and cannot, cite any section of the Small MS4 Permit that
2 supports that conclusion. The Small MS4 Permit holds Defendants
3 responsible for their discharges. See ECF No. 95-7 at 22-23. Simply
4 put, the source of the pollutants in the MS4 discharges is irrelevant
5 to whether Defendants are violating the Small MS4 Permit.

6 The Regional Board has stressed this fact in response to
7 Defendants' reports. See ECF 45-20 at 67 ("it is important to note
8 that the Basin Plan Water Quality Objectives. . . for fecal coliforms
9 in a surface water does not specify that the limit is restricted to
10 human sources. Fecal coliforms, regardless of source, are subject to
11 the Water Quality objective.") (emphasis added). Thus, Defendants
12 are responsible for its MS4 and what discharges from it. To the
13 extent that "background" or "non-human" sources of pollutants are
14 causing or contributing to exceedances of WQS, Defendants are
15 responsible for implementing BMPs designed to prevent those
16 pollutants from discharging from its MS4. See ECF No. 95-7 at 22-
17 23. Further, as explained below in Section IV.D, there is ample
18 evidence to support a finding that the pollutants in Defendants'
19 discharges are directly related to the Facility's activities, not
20 merely "background" sources.

21 **C. The Arguments Defendants Make Related to Provision D –**
22 **Receiving Water Limitations – Are Irrelevant to the Court's**
23 **Analysis of Violations.**

24 Defendants' sampling shows that their MS4 discharges to Mule
25 Creek have exceeded WQS for metals and *E. coli* on the same days that
26 Mule Creek exceeds those WQS. Maharg Decl., Ex. 1 (Ashby Decl.),
27 tbls. 4, 6, 9, 11. This evidence supports a finding that Defendants'
28 discharges have contributed to exceedances of WQS, in violation of

1 Provision D. See ECF No. 95-7 at 22. In fact, Defendants' expert,
2 Timothy Simpson, agrees with the methodology of evaluating
3 concurrent sampling at the discharge points and the downstream
4 sampling point to determine whether a discharge causes or contributes
5 to an exceedance of a WQS, ECF No. 95-5, ¶ 28, which is the approach
6 that Plaintiffs have followed.

7 Yet Defendants argue that CSPA cannot show violations of
8 Provision D, Receiving Water Limitations, for three unavailing
9 reasons: (1) Mule Creek is not listed as impaired for metals or *E.*
10 *coli* on the 303(d) list; (2) upstream sources contribute metals and
11 *E. coli* to Mule Creek; and (3) Defendants have engaged in an
12 iterative process to remedy violations. See ECF No. 95-1 at 26-27,
13 29-33. As explained below, all of these points are irrelevant and
14 misstate the clear requirements of the Small MS4 Permit.

15 1. Provision D Does Not Require CSPA to Show Mule
16 Creek Is or Should Be Listed under the 303(d)

17 Nothing in Provision D limits its application to discharges
18 into waterbodies that are listed under California's 303(d) list. The
19 303(d) list includes waterbodies that do not attain WQS as a whole
20 or on a regular basis. See 33 U.S.C. § 1313(d); see ECF No. 95-7 at
21 15. In contrast, Provision D prohibits discharges that "cause or
22 contribute to an exceedance of WQS." ECF No. 95-1 at 22 (emphasis
23 added). The Small MS4 Permit is clear when conditions only apply to
24 waterbodies that are listed under the 303(d) list and/or have a Total
25 Maximum Daily Load to address those impairments. See, e.g., ECF No.
26 95-7 at 35 (Provision E.9.b); 41 (Provision E.10.a); 66 (Provision
27 E.13.b-c), 78-82 (Provision E.15); and 313-386 (Attachment G). In
28

1 contrast, Provision D applies to all discharges, not only those that
 2 enter waterbodies listed under Clean Water Act § 303(d). *Id.* at 22;
 3 see *Cal. Sportfishing Protection Alliance v. River City Waste*
 4 *Recyclers*, 205 F.Supp.3d 1128, 1142, 1150-51 (E.D. Cal 2016) (“*River*
 5 *City*”) (finding that a discharge above WQS violated this permit
 6 provision without evidence that the receiving water was listed under
 7 § 303(d).

8 2. CSPA Need Not Show that Defendants Are the Sole
 9 Cause of *E. Coli* or Metals in Mule Creek.

10 Contrary to Defendants’ argument, ECF No. 95-1 at 27:12-13, the
 11 plain language of Provision D is unambiguous: CSPA does not need to
 12 show that an MS4 discharge is the sole cause of an exceedance of a
 13 WQS in Mule Creek; rather, it is sufficient that the discharges
 14 contribute to an exceedance. ECF 95-7 at 22. “If the language of the
 15 permit is plain and capable of legal construction, ‘the language
 16 alone must determine the permit’s meaning’” *NRDC v. Cty. of L.A.*,
 17 725 F.3d 1194, 1204 (9th Cir. 2013) (quoting *Piney Run Pres. Ass’n*
 18 *v. Cty. Comm’rs.*, 268 F.3d 255, 270 (4th Cir. 2001)). Every discharge
 19 into a receiving water that exceeds applicable WQS contributes to
 20 the exceedance within the receiving water. See *NRDC*, 725 F.3d at
 21 1206-07; *Cal. Sportfishing Protection Alliance v. Chico Scrap Metal*,
 22 124 F.Supp.3d 1007, 1020-22 (E.D. Cal. 2015) (finding discharges
 23 above WQS “cause or contribute to an exceedance of any applicable
 24 [WQS]”); accord *River City Waste*, 205 F.Supp.3d at 1142, 1150-51;
 25 *Baykeeper v. Kramer Metals, Inc.*, 619 F.Supp.2d 914, 928-29 (C.D.
 26 Cal. 2009). Ms. Ashby counted a violation of Provision D only when
 27 outfall samples showed the Facility’s discharges exceeded metals and

1 *E. coli* WQS and samples within Mule Creek showed that it was
2 exceeding the WQS on the same day. ECF 45-4 at tbls. 4, 6, 10-11.
3 While CSPA does not dispute that upstream sources may contribute to
4 an exceedance of WQS in Mule Creek, this does not excuse Defendants'
5 contribution to those exceedances as evidenced by their MS4
6 discharges above WQS. Moreover, the study Defendants primarily rely
7 on actually found that in one third of the sampling days, "the
8 concentration [of *E. coli*] increase moving past the prison property
9 was sufficient to cause a downstream water quality standard
10 exceedance where the upstream sample was in compliance." ECF No. 97-
11 3 at 8 (emphasis added). Thus, Defendants "caused," not just
12 contributed, to an exceedance in Mule Creek on those days.

13 3. Engaging in the Iterative Process Does Not Excuse
14 Violations of Provision D.

15 Defendants assert that, because they are engaged in a (largely
16 undefined) "iterative process" to develop and implement BMPs with
17 the Regional Board, they cannot be held liable for discharges that
18 violate Provision D. See ECF 95-1 at 36. According to Defendants'
19 theory, their discharges do not need to actually meet the
20 requirements of Provision D, as long as they implement some BMPs and
21 talk to the Regional Board. It does not matter whether the BMPs are
22 effective or how much pollution their discharges contribute to Mule
23 Creek. This theory must be rejected because it contradicts a plain
24 reading of the Small MS4 Permit and would render the permit
25 unenforceable, allowing Defendants to exceed Receiving Water
26 Limitations indefinitely. See *Nw. Env'tl. Advocates v. City of*
27 *Portland*, 56 F.3d 979, 989-90 (9th Cir. 1995) (finding that permit
28

1 requirements to comply with WQS are enforceable).

2 Contrary to Defendants' argument, the Small MS4 Permit requires
3 strict compliance with Receiving Water Limitations, Provision D, and
4 does not excuse violations of this provision through such an
5 undefined process lacking any actual standards for compliance, and
6 finding support in the Fact Sheet, only, not the Small MS4 Permit
7 itself. In the Small MS4 Permit, the State Board exercised its
8 discretion to require strict compliance with all applicable WQS. See
9 ECF 95-7 at 22; see also *id.* at 421 ("The State Water Board has
10 previously determined that limitations necessary to meet WQS are
11 appropriate for the control of pollutants discharged by MS4s and
12 must be included in MS4 permits.").

13 While Provision D requires further action when a permittee is
14 not complying with its terms, it does not exempt permittees from
15 enforcement of those violations. See ECF No. 95-7 at 22. The Small
16 MS4 Permit's Fact Sheet specifically rejects Defendants'
17 interpretation:

18 [t]he Water Boards have maintained that the
19 iterative process does not provide a "safe harbor"
20 to MS4 permittees: that is, when a discharge is shown
21 to be causing or contributing to an exceedance of
22 water quality standards, that discharge is in
23 violation of the relevant discharge prohibitions and
24 receiving water limitations of the permit and
potentially subject to enforcement by the Water
Boards or through a citizen suit, even if the
discharge is activity engaged in the iterative
process.

25 ECF No. 95-7 at 422, emphasis added. The Ninth Circuit also has
26 rejected the argument asserted by Defendants here. See *NRDC v. Cnty*
27 *of Los Angeles*, 673 F.3d 880, 897 (9th Cir. 2011). As here,

1 defendants in that case argued that strict compliance with WQS was
2 not enforceable because the permit provided that permittees shall
3 engage in an "iterative process" when it was determined they were
4 not meeting WQS. *Id.* at 887-88. The Ninth Circuit roundly rejected
5 that position: "[a]lthough Defendants argue that compliance with
6 other Permit provisions, in particular Part 2.3's iterative process,
7 forgives violations of the discharge prohibitions in Parts 2.1 and
8 2.2, no such 'safe harbor' is present in this Permit." *Id.* at 897;
9 see also *Hawaii's Thousand Friends v. City and Cty. of Honolulu*, 821
10 F.Supp. 1368, 1392 (D. Haw. 1993) ("Courts throughout the country
11 have held that NPDES compliance is a matter of strict liability, and
12 a defendant's intent and good faith are irrelevant").

13 Even if engagement in the iterative process were to safeguard
14 Defendants from enforcement, which it does not, as recently as
15 November 3, 2022, the Regional Board notified Defendants that they
16 have not complied with orders to address ongoing violations of
17 Provision D. See Maharg Decl., Ex. 21 at 1-3 (notifying Defendants
18 that their NSWDE Elimination Plan did not satisfy a requirement of
19 the 13383 Order because it did not address metals exceedances). Thus,
20 there is a dispute of fact as to whether Defendants have even
21 adequately engaged in the iterative process.

22 **D. Defendants Improperly Interpret Provision B.1 by Limiting**
23 **the Types of Waste Prohibited by the Basin Plan.**

24 Defendants move for summary judgment on CSPA's claims under
25 Provision B.1, yet they provide no authority or evidence
26 demonstrating they are actually in compliance with that provision.
27 See ECF 95-1 at 27-28. Rather, they base their argument solely on
28

1 their assertion that they do not know what discharges the Basin Plan
2 prohibits. See ECF No. 95-1 at 28:16-17. To obtain summary judgment
3 in their favor, Defendants must show there is no reasonable dispute
4 of fact that were in compliance with Provision B.1 when the Complaint
5 was filed and remain so. They have failed to do so, and for that
6 reason, their motion for summary judgment as it relates to violations
7 of Provision B.1 should be denied.

8 Here, the evidence shows that Defendants have violated
9 Provision B.1 because they have discharged waste that is prohibited
10 by the Basin Plan. See ECF No. 95-7 at 22 (Small MS4 Permit, Provision
11 B.1, which states: "Discharges of waste from the MS4 that are
12 prohibited by Statewide Water Quality Control Plans or applicable
13 Regional Water Quality Control Plans (Basin Plans) are
14 prohibited."). The California Water Code and Small MS4 Permit define
15 "waste" broadly to include:

16 sewage and any and all other waste substances,
17 liquid, solid, gaseous, or radioactive, associated
18 with human habitation, or of human or animal origin
any substance associated with human habitation.

19 Cal. Water Code § 13050(c); ECF 95-7 at 397. The Facility's MS4
20 discharges, and the pollutant concentrations therein, fall under
21 this definition of waste for a number of reasons.

22 At the outset, the stormwater at the Facility, regardless of
23 its pollutant concentration, is a "substance associated with human
24 habitation" because it is channelized and discharged from the
25 Facility, which is manmade and houses humans. A substance that is
26 natural or innocuous becomes a "waste" under the Water Code
27 definition when a person or entity changes its natural state in the

1 environment. See *Santa Clara Valley Water Dist. v. Cal. Regional*
2 *Water Quality Control Bd.*, 59 Cal. App. 5th 199, 210 (2020) (finding
3 that sediment became a waste because the "project's widening of the
4 creek bed will slow the flow of water and lead to increased
5 sedimentation that will be concentrated in the creek instead of
6 carried downstream."). Here, the stormwater is not merely running
7 into Mule Creek as it would in its natural state, but instead runs
8 over the Facility's infrastructure and grounds, is collected and
9 transported through the MS4, and then discharged to Mule Creek. Thus,
10 it is "associated with human habitation" and is a waste.

11 Moreover, the stormwater in this case, in contrast to the
12 sediment in the *Santa Clara Valley Water Dist.* case, includes other
13 known pollutants: metals and *E. coli*. The Regional Board has found
14 that Defendants' discharges contain "waste constituents." Maharg
15 Decl., Ex. 22 at MCSP31321. Metals are associated with human
16 habitation, as well as industrial uses. See *id.* at MCSP31313.
17 Defendants' Storm Water Master Plan lists several "hot spots" at the
18 Facility that they identify as contributing metals to stormwater
19 discharges, such as the firing range, the metal fabrication area,
20 parking lots and outdoor storage areas associated with vehicle
21 maintenance, the recycling yard, and the vocational welding area.
22 Maharg Decl., Ex. 28 (MSCP Storm Water Master Plan) at MCSP2069-
23 2081; see *id.*, Ex. 2 (Orta Tr.) 142:2-143:7. Thus, the metals in the
24 stormwater, at least in part, are produced by human activities and
25 therefore render the Facility's stormwater discharges waste within
26 the meaning of the California Water Code.

27 Further, the Facility's stormwater discharges consistently
28

1 contain concentrations of *E. coli* well-above WQS. See Maharg Decl.,
2 Ex. 1 (Ashby Decl.) at tbls. 2-3, 8. *E. coli* could be present as a
3 result of wastewater entering the MS4. See Maharg Decl., Ex. 29
4 (Emerick Expert Report) at 10-11, 15-16, 18; see also, *infra*, § IV.F.
5 The likelihood that wastewater is contributing *E. coli* was confirmed
6 by the fact that water in the MS4 also contained a variety of
7 pharmaceuticals and personal care products. *Id.* at 10-11, 17-18.
8 While Defendants dispute that wastewater is entering and/or
9 discharging from the MS4, this dispute of fact requires the denial
10 of Defendants' Motion.

11 Even so, Defendants' own admissions confirm that the discharges
12 of *E. coli* are waste. Mr. Orta admits that pharmaceuticals in the
13 Facility's MS4 are from inmates (i.e., human habitation). ECF 95-4,
14 ¶ 14. Moreover, Defendants repeatedly state that the *E. coli* is from
15 animals. See ECF No. 95-1 at 25. Because a "waste" can be of "animal
16 origin," this is sufficient. Cal. Water Code §13050(c).

17 In short, there is no reasonable dispute that Defendants'
18 stormwater discharges are "waste" under the broad definition of the
19 term in the Water Code. See also *Sweeney v. Cal. Reg'l Water Quality*
20 *Control Bd.*, 61 Cal. App. 5th 1093, 1116-17 (2021) (definition of
21 waste should be construed liberally). At the very least, there is
22 ample evidence for a reasonable trier of fact to determine the
23 discharges are waste.

24 Further, Defendants' discharges of waste are prohibited by the
25 Basin Plan when the discharges exceed WQS established by the Basin
26 Plan or other applicable water quality control plan, such as the
27 State Bacteria Objectives. The Basin Plan establishes the beneficial
28

1 uses and the objectives or standards necessary to protect those uses,
2 as required by the Clean Water Act and the California Water Code.
3 See ECF No. 95-7 at 560. The fundamental purpose of the Clean Water
4 Act is to protect beneficial uses. See 33 U.S.C. §§ 1251(a), 1312(a);
5 Cal. Water Code § 13000 ("The Legislature's goal in enacting the
6 Porter-Cologne Act was "to attain the highest water quality which is
7 reasonable. . ."); see ECF No. 95-7 at 560 (purpose of Basin Plan
8 is to establish beneficial uses and criteria (i.e., WQS) to protect
9 them). Thus, unless the discharges are otherwise permitted, any
10 discharge that exceeds WQS established by the Basin Plan are
11 prohibited, in accordance with Provision B.1.²

12 There is ample evidence to conclude that Defendants' discharges
13 exceed WQS in violation of the Basin Plan and Provision B.1.
14 Defendants do not dispute that their discharges from MCSP2 and MCSP3
15 reach Mule Creek and exceed WQS. ECF No. 95-2 at ¶24. There is also
16 no dispute that Defendants' sampling at MCSP5 and MCSP6 exceed WQS.
17 See Maharg Decl., Ex. 1, tbls. 8, 10. While there is a genuine
18 dispute of fact that the samples taken at MCSP5 and MCSP6 reach Mule
19 Creek, that dispute justifies denying this motion, not granting it.

23 ² Defendants imply that the only prohibitions in the Basin Plan are
24 based on amendments that include the word "Prohibition" in the title.
25 See 95-1 at 28:14 (citing to Basin Plan, RJN, Ex. C at pp. 110-111,
26 112, 114). The page numbers that Defendants cite to in the Basin
27 Plan do not exist, making it impossible to understand Defendants'
28 argument. However, there is no support for the assertion that only
a few amendments include applicable prohibitions. The Basin Plan in
its entirety establishes the standards that govern water quality of
receiving waters and discharges thereto. See ECF No. 95-7 at 560.

E. Whether or Not the Discharges Cause or Threaten to Cause a Condition of Pollution or Nuisance in Violation of Provision B.2 Is a Disputed Question of Fact for Trial.

Provision B.2 prohibits “[d]ischarges of storm water from the MS4 to waters of the U.S. in a manner causing or threatening³ to cause a condition of pollution⁴ or nuisance⁵ as defined in Water Code § 13050.” ECF No. 95-7 at 21. Defendants assert that CSPA cannot prove violations of Provision B.2 for two reasons: (1) Mule Creek has not been listed as impaired for metals or *E. coli*; and (2) CSPA has not yet established that discharges at MCSP5 and MCPS6 after the Complaint was filed reach Mule Creek. Both points are irrelevant to the Court’s analysis of violations of Provision B.2.

Defendants’ first argument improperly conflates pollution and/or nuisance with a waterbody’s listing on the 303(d) list. There is nothing in the California Water Code definition of pollution or nuisance that states that these conditions only occur when a water body is listed under the 303(d) list. See Cal. Water Code §§ 13050(1) – (m).⁶

³ “‘Threaten’. . . means a condition creating a substantial probability of harm. . . .” Cal. Water Code § 13304(e).

⁴ “‘Pollution’ means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (A) The waters for beneficial uses. (B) Facilities which serve these beneficial uses.” Cal. Water Code § 13050(1)(1).

⁵ “‘Nuisance’ means anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes.” Cal. Water Code § 13050(m).

⁶ Defendants also incorrectly conflate “impairment” with listing

Defendants do not dispute that their discharges to Mule Creek, as evidenced by sampling at MCSP2 and MCSP3, have exceeded WQS for metals and *E. coli*. Maharg Decl., Ex. 1, tbls. 2-3, 5; ECF No. 95-2 at ¶24. WQS equate to the level of pollution that is necessary to protect beneficial uses. See ECF No. 95-7 at 560; see 33 U.S.C. § 1313 (2)(A); see also *PUD No. 1 v. Wash. 'ep't of Ecology*, 511 U.S. 700, 704 (1994) (WQS "prevent water quality from falling below acceptable levels."). Therefore, discharges above a water quality standard, as a matter of law, threaten to "unreasonably affect[]" Mule Creek's beneficial uses and, thus, are pollution. Cal. Water Code §13050(1). Moreover, because metals and *E. coli* WQS are established to protect uses related to human health (i.e., drinking water and water contact recreation uses, respectively), discharges above WQS, as a matter of law, are or threaten to be "injurious to health" and, thus, are a nuisance. Cal. Water Code § 13050(m)(1); see ECF No. 95-8 at 3 (stating WQS set to protect people recreating in waters). Accordingly, as a matter of law, discharges above WQS set to protect human health "threaten to cause a condition of pollution or nuisance." ECF No. 95-7 at 21.

Even if this Court were to determine that discharges that exceed WQS were not sufficient to show a violation of Provision B.2 as a matter of law, whether or not a discharge has created or threatened to create a condition of pollution or nuisance would then be a

under Clean Water Act section 303(d). Even if CSPA was required to show that Mule Creek is "impaired" (which nothing in B.2 requires), a water body is impaired if it fails to meet WQS, even if it is not formally listed under 303(d). ECF No. 95-7 at 12 (Small MS4 Permit at 10, n. 4) Sampling in Mule Creek consistently shows that it exceeds WQS. See Maharg Decl., Ex. 1, tbls. 4, 6, 9, 11.

1 question of fact. Defendants have offered no evidence to support a
2 finding that their discharges exceeding WQS do not unreasonably
3 affect the beneficial uses of Mule Creek or are not injurious to
4 health, other than the fact that Mule Creek has not been formally
5 listed under 303(d). However, the harm to beneficial uses need not
6 be quantified or certain to qualify as pollution, let alone rise to
7 the level of listing under Clean Water Act section 303(d). See
8 *Sweeney, supra*, 61 Cal.App.5th at 1122.

9 Defendants next argue that CSPA cannot show violations of
10 Provision B.2 because CSPA has not proven that MCSP5 and MCSP6
11 discharge to Mule Creek. ECF No. 95-1 at 29. For the reasons
12 explained in Section IV.A, *supra*, Defendants have not met their
13 burden of showing that they have not and are not likely to discharge
14 to Mule Creek again.

15 In short, the undisputed evidence shows that Defendants'
16 discharges to Mule Creek have exceeded WQS for metals and *E. coli*.
17 This is sufficient, at a minimum, to create a dispute of fact as to
18 whether the discharges have caused or threaten to cause a condition
19 of pollution or nuisance in Mule Creek, in violation of Provision
20 B.2. Thus, Defendants' Motion as it relates to violations of
21 Provision B.2 should be denied.

22 **F. There Are Numerous Disputes of Material Fact as to**
23 **Defendants' Violations of Provision B.3.**

24 Defendants move for summary judgment on CSPA's claims that
25 Defendants have violated Provision B.3. ECF No. 95-1 at 29-33.
26 Provision B.3 requires that "[d]ischarges through the MS4 of material
27 other than storm water to waters of the U.S. shall be effectively

1 prohibited." ECF No. 95-7 at 21. There is extensive evidence,
2 including numerous findings by the Regional Board, that non-
3 stormwater is getting into the MS4, both in the form of wastewater
4 (sewage) and non-exempt irrigation discharges. Moreover, the
5 evidence shows that Defendants have not yet taken measures to
6 effectively prohibit these non-stormwater sources. Non-stormwater in
7 the MS4 is discharged to Mule Creek during rain events when
8 Defendants open the slide gates and allow for discharges to Mule
9 Creek. See, e.g., Maharg Decl., Exs. 8-20 (Discharge Notifications);
10 see also Maharg Decl., Ex. 1 (Orta Tr.) at 121:16-22 (testifying
11 that slide gates are not water-tight). Thus, there are host of
12 disputed facts concerning whether Defendants have violated Provision
13 B.3, and the Motion should be denied.

14 1. The Regional Board Has Found Defendants Have
15 Discharged Wastewater from the MS4; and CSPA's
Evidence Supports that Conclusion.

16 Defendants spend a significant amount of page space in their
17 Motion describing two studies they conducted and that they assert
18 prove the Facility is not discharging wastewater. ECF No. 95-1 at
19 31-33. Defendants also stress that they have conducted these
20 investigations "in direct cooperation with the Water Board's
21 permitting staff." *Id.* at 31:25. Yet, Defendants casually omit the
22 fact that the Regional Board has consistently disagreed with
23 Defendants' conclusions and have specifically found that Defendants
24 have discharged wastewater commingled with stormwater.

25 Defendants' investigation of the stormwater collection system
26 and sanitary sewer systems found hundreds of defects in both systems.
27 See Maharg Decl., Ex. 22 (Regional Board Review of SHN Report) at
28

1 MCSP31308. While Defendants' report concludes no direct cross
2 connections exist, the investigations do not support a conclusion
3 that no indirect cross connection exist. *Id.* at MCSP31320-21 ("it is
4 clear to Board staff that indirect cross connections have formed
5 between the [storm and sewer] systems."); see also *id.*, Ex. 4 at
6 MCSP32976 (EPA finding same); see also *id.*, Ex. 32 (Croyle Tr.),
7 39:7-41:20, 70:8-73:4. Critically, Defendants' designated
8 representative, Mr. Gregor Larabee, confirmed that the SHN Report
9 only concludes there are no direct connections, i.e., "no physical
10 connection of a sanitary sewer [pipe] to a stormwater [pipe]." See
11 Maharg Decl., Ex. 3 (Larabee Tr.) at 117:22-118:19.

12 Further, Plaintiffs sampled liquid within the MS4 during dry
13 weather and found pharmaceuticals and personal care products present
14 in the samples. Maharg Decl., Ex. 1 (Ashby Decl.), ¶24; see also
15 Maharg Decl., Ex. 29 (Emerick Expert Rpt.) at 10, 15-18; see also
16 ECF No. 95-2, ¶ 77 (Defendants admitting pharmaceuticals were found
17 in the MS4). CSPA's expert consultant, Dr. Robert Emerick, testified
18 that pharmaceutical and personal care products strongly indicate
19 wastewater is present in the MS4. Maharg Decl., Ex. 29 at 4, 10-11;
20 *Id.*, Ex. 30 (Emerick Tr.) at 136:23-151:5; see also *Hawaii Wildlife*
21 *Fund v. Cnty. of Maui*, 550 F.Supp.3d 871, 882, 890 (D. Haw.
22 2021) (finding that the presence of chemicals with only human sources,
23 "the most conclusive being pharmaceuticals," in stormwater indicated
24 a wastewater component).

25 Defendants' assertions that wastewater is not getting into
26 their MS4, even if based on two studies they conducted, does not
27 support a finding of summary judgment. Defendants' assertions that

1 the low levels of ammonia were present in their MS4 discharges does
2 not resolve this dispute of fact. Dr. Emerick directly addressed
3 this assertion and stated that while ammonia can be a "good
4 indicator" of sewage, it is "not a perfect indicator" because (a)
5 storm water "can dilute the ammonia down below the detection limit
6 of the ammonia test quicker than you can dilute out coliform or *E.*
7 *coli*," and (b) ammonia commonly goes through a nitrification process
8 and converts to nitrate in a low-oxygen environment, such as soil.
9 Maharg Decl., Ex. 30 (Emerick Tr.) at 55:17-63:4. In fact, Dr.
10 Emerick testified that where sewage is indirectly cross-
11 contaminating the MS4, as CSPA asserts in this case, he "wouldn't
12 have expected to see ammonia." *Id.* at 62:24-63:4. Defendants' expert
13 opinions to the contrary merely create a genuine dispute of material
14 fact that must be resolved at trial.

15 2. Defendants Admit that Irrigation Water (i.e., Non-
16 Stormwater) Has Discharged and Continues to
17 Discharge through the MS4 Due to Defects in the
18 Irrigation System.

19 Defendants have admitted and self-reported for years that
20 irrigation water is getting into their MS4 due to defects in their
21 irrigation system. See Maharg Decl., Ex. 23 at MCSP33473; see also
22 *id.*, Ex. 7 (Dec. 2020 13383 Order) at MCSP32215-16. The Regional
23 Board concluded that the irrigation discharges are not exempt under
24 Provision B.3 because they are caused by defects, not simply
25 incidental irrigation runoff. *Id.*, Ex. 24 at MCSP40146.

26 3. Defendants Have Not Effectively Prohibited the
27 Identified Sources of Non-Stormwater.

28 Further, Defendants have not yet taken any action to address

1 these sources of non-stormwater; therefore, Defendants have not
2 "effectively prohibited non-stormwater," as required by Provision
3 B.3. In 2019, Defendants stated, and the Regional Board concurred,
4 that the defects in the sanitary sewer system should and would be
5 fixed to prevent wastewater from commingling with stormwater. See
6 ECF No. 95-3 at 165-166; Maharg Decl., Ex. 26 (SHN Report, Appendix
7 23); *Id.*, Ex. 20 (Regional Board Review) at MCSP31322. Yet, in August
8 2022, Defendants' representative stated that those repairs had not
9 yet been completed. Maharg Decl., Ex. 2 (Orta Tr.) at 114:6-13.
10 Moreover, Defendants have asserted that the pharmaceutical and
11 personal care products could be entering the MS4 as a result of
12 prisoners throwing their medicine into storm drains. ECF No. 95-4,
13 ¶ 14. Yet Defendants testified they have not taken action to address
14 this behavior, if it exists. Maharg Decl., Ex. 2 (Orta Tr.) at
15 128:19-22. This alone provides sufficient evidence for a trier of
16 fact to determine that Defendants have not "effectively prohibited"
17 wastewater or other sources of pharmaceutical and personal care
18 products from being transported through the MS4 to Mule Creek.

19 Similarly, Defendants have not yet effectively prohibited
20 irrigation flows from discharging through the MS4. Defendants have
21 stated, under penalty of perjury, that they will not come into
22 compliance with Provision B.3 with regards to their irrigation
23 discharges until February 2025. ECF No. 95-4 at 19.

24 Defendants wrongly assert that they need only reduce pollution
25 to the maximum extent possible to meet the requirements of Provision
26 B.3. ECF No. 95-1 at 30-31. While the Small MS4 Permit does require
27 Defendants to meet the "maximum extent possible" (MEP) standard, the
28

1 requirement to effectively prohibit non-stormwater is a separate,
2 enforceable requirement in the Small MS4 Permit and is required of
3 every municipal stormwater permittee by the Clean Water Act. See 95-
4 7 at 21-22 (Provision B.3 and Provision C.1); *id.* at 419 (Fact Sheet
5 explaining that Clean Water Act requires effective prohibition of
6 non-stormwater, citing Clean Water Act § 402(p)(3)(B)(ii)).

7 As they did in their opposition to Plaintiffs' Motion for
8 Summary Judgment, Defendants misconstrue *Defenders of Wildlife v.*
9 *Browner*, 191 F.3d 1159 (9th Cir. 1999). The Ninth Circuit has not
10 stated that municipal stormwater permittees are only subject to the
11 MEP standard, as Defendants assert. ECF No. 95-1 at 31. To the
12 contrary, the Ninth Circuit, in *Defenders*, explicitly determined
13 that permitting agencies retain "authority to determine that
14 ensuring strict compliance with state water-quality standards is
15 necessary to control pollutants" in MS4 permits. *Defenders*, 191 F.3d
16 at 1166; *see also Bldg. Indus. Assn. of San Diego Cty. v. State Water*
17 *Res. Control Bd.*, 124 Cal.App.4th 866, 885 (2004).

18 Here, the State Board, when adopting the Small MS4 Permit,
19 exercised its discretion to require strict compliance with all
20 applicable WQS.⁷ While it is left to the State Board's discretion to
21 require compliance with WQS, the Clean Water Act explicitly requires
22 that all municipal stormwater permits, like the Small MS4 Permit,
23 include a prohibition against discharging non-stormwater. 33 U.S.C.
24 § 1342(p)(3)(B)(ii).

25 ⁷ Defendants' use of *Defenders* to argue they need not comply with
26 Provision B.3's prohibition against discharging non-stormwater is
27 confusing. *Defenders* concerns a municipal permittees' obligation
28 to comply with WQS, which, in the Small MS4 Permit, is implemented
through Provisions B.1 and D, not Provision B.3.

G. Defendants Misstate Plaintiff CSPA's Claim Regarding the Land Application Areas.

Defendants assert they are challenging both Plaintiffs' allegations that Defendants' improper management of their Land Application Areas ("LAAs") cause unpermitted discharges to Mule Creek in violation of the Clean Water Act. ECF No. 95-1 at 21-22. However, Defendants only address the County's theory of the case, ignoring CSPA's claims entirely. *Id.* at 21, n. 10. Defendants take issue with the County's allegations that application of treated wastewater effluent to land is the functional equivalent of a direct discharge to Mule Creek. *Id.* at 21:9-12. While the County makes allegations based on a "functional equivalent" theory, CSPA instead alleges direct discharges from the LAAs in its complaint. ECF No. 1 at 12:10-13:11; 14:20-26.

Defendants apparently rely on a sentence in the Court Order on Plaintiffs' Motion for Summary Judgment that says "[a]fter the cases were consolidated, the plaintiffs jointly filed what is now the operative complaint on January 26, 2022. (Docket No. 35.)" ECF No. 60 at 5:6-8. However, Plaintiffs never jointly filed a complaint. Docket Number 35 is the County's First Amended Complaint and does not include CSPA as a plaintiff. *See, e.g.,* ECF No. 35 at 3:11-13 (naming the County as the sole plaintiff). This independent filing is consistent with the Court's Order on Consolidation, which did not order the Plaintiffs to file a joint complaint or otherwise designate either complaint as the operative complaint. *See* ECF No. 18; *see also Hall v. Hall*, 138 S. Ct. 1118, 1130 (2018) ("actions do not lose their separate identity because of consolidation.") Because Defendants' argument does not address CSPA's allegations, summary

1 judgment against CSPA on this issue would be improper.

2 In any event, Defendants' motion for summary judgment must be
3 denied because a genuine dispute of material fact exists as to
4 whether the LAAs have discharged via surface runoff to Mule Creek.
5 While Defendants may discharge treated wastewater to the LAA, the
6 discharges are not permitted to discharge to Mule Creek. ECF No. 95-
7 8 at 34 (prohibiting discharges to surface waters). Defendants
8 provided no evidence that their LAAs have not discharged to Mule
9 Creek. See ECF No. 95-1 at 21-22. Yet, there is evidence to support
10 a finding to the contrary.

11 On August 13 2020, Regional Board staff documented that the
12 LAAs "appear to be underutilized and inconsistently irrigated.
13 Uneven irrigation and poor vegetation management is likely
14 decreasing disposal capacity, and may be causing runoff or seepage
15 into the creek." Maharg Decl., Ex. 31 at COA0105778. Staff also
16 observed flowing water in Mule Creek from the Facility, and they
17 surmised the LAAs could be the source. *Id.* at COA0105778-79,
18 COA0105783. The Regional Board's lead staff contact, Kenneth Croyle,
19 testified that Defendants "put too much hydraulic loading on those
20 spray fields [LAAs], and so their staff has observed damp creek beds
21 after irrigation as well as ponded water in the bottom of the creek.
22 . . . the hydraulic loading is thought to be the cause of that water
23 in the creek during the dry season." Maharg Decl., Ex. 32 (Croyle
24 Tr.) at 106:2-6, 106:13-14. Mr. Croyle also testified he has ongoing
25 concerns that Defendants will discharge from their LAAs in the
26 future. *Id.* at 107:3-7. Thus, at a minimum, there is a dispute as to
27 whether the LAAs have discharged, and will continue to discharge, to
28

1 Mule Creek, and the Motion must be denied on this ground.

2 **V. CONCLUSION**

3 For all of the reasons set forth above, CSPA respectfully
4 submits that the Motion should be denied in its entirety.

5
6 Respectfully submitted,

7 Dated: December 12, 2022

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8
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